Petition

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81-1061

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH MACKIN GANLEY, III,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTION PRESENTED

1. Whether or not, in light of the circumstances, the Trial Court's failure to strike Juror Stokes for cause abridged the Petitioner's constitutional right to be tried by a fair and impartial jury, to be confronted with the witnesses against him, and to due process of law guaranteed under the United States Constitution and the Maryland Declaration of Rights.

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No.

JOSEPH MACKIN GANLEY, III,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Court of Special Appeals of Maryland entered in this proceeding on July 27, 1981.

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland was a per curiam opinion which will not be officially reported. (Appx. A. infra)

JURISDICTION

The opinion of the Court of Special Appeals of Maryland was entered on June 24, 1981, and the Mandate issued on July 27, 1981. A timely petition for Writ of Certiorari to the Court of Appeals of Maryland was filed on August 11, 1981. The Court of Appeals of Maryland entered an order denying the Petition for Writ of Certiorari on October 7, 1981. This Petition for Writ of Certiorari was filed within sixty days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and the causes of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Maryland Declaration of Rights, Article 21:

> That in all criminal prosecutions, every man hath a right to be informed of the accusations against him; to have a copy of the indictment, or charge, in due time (if required) to prepare for his defense; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

STATEMENT OF THE CASE

On June 7, 1980, Gary Dorough and Bernice Stossel were watching television. At about 11:00 p.m., there was a knock on the door. Dorough answered the door and found Julie Nicholas, his roommate's girlfriend, alone. She told Dorough that Ganley would be arriving shortly, that he was dropping somebody off and she was to meet him there.

Subsequently, Ms Nicholas told the couple she was going to lie down and wait for Mack. Dorough asked her to ". . . come out and have a drink with us until Mack gets here?" She replied, "No, I've had enough."

Minutes later, Ganley entered the apartment. Dorough informed Ganley that Ms Nicholas was there. Ganley replied, "You're kidding, you're kidding?" and went to his bedroom. Ms Nicholas was sitting up on the bed with her back against the wall and said, "Good evening, Mr. Ganley." Ganley did an about turn and returned to the living room, exchanging quips with the couple in the living room and Ms. Nicholas.

Ganley returned to the bedroom. He walked to the foot of the bed and from that angle was able to observe the gun for the first time, laying on the bed near Ms Nicholas' thigh. It

was his practice to keep his gun unloaded in his nightstand and the ammunition in the dresser across the room. He inquired, "What's that there for?" She replied, "I'm not afraid of you. I know you won't hurt me." He then went to the side of the bed, reached over Ms Nicholas and picked up the gun, at which time she moved down in the bed and rolled over, turning her back to him. In an effort to clear the gun, Ganley opened the gun, hit it against his hand and closed it. He placed his arm across her back, cocked the gun and pulled the trigger twice. First, it dry fired. The second time it discharged the fatal shot. It was at this time that the couple in the living room heard what they both described as a firecracker. Ganley then raced into the living room shouting hysterically, "I shot Julie." He had to drag his disbelieving roommate into the bedroom to convince Dorough that in fact a shot had been fired. Ganley requested they call the police, and Ms Stossel did so.

Sgt. Miller of the Prince George's County Police Department responded to a radio run for a shooting. The ambulance was already present, and Sgt. Miller was approached by Gary Dorough who led him to the apartment. Upon entering the back bedroom, he observed a female lying face down on the bed. He attempted to determine if there were any life signs. He did not observe a gunshot wound, but did see some small amount of blood on the bed.

Sgt. Miller remained in the apartment for some 30 to 40 minutes before Det. Jones arrived. During the interim, he spoke with Mr. Dorough and Ms Stossel, who both stated the shooting had been an accident. Subsequently, Sgt. Miller turned the crime scene over to Det. Jones and went outside. There he observed Ganley, who he described as, "not too clear about what was going on." Further, Ganley "appeared that he may have had some alcohol."

Det. Jones conducted an investigation of the body. He described Ms Nicholas as lying on her left side, wearing blue jeans, a red plaid shirt, kneehigh hose and undergarments. Her shoes and pocketbook were on the floor. There was an entrance contact, gunshot wound to the base of the skull and an exit gunshot wound to the top of the skull.

Det. Jones noted a whiskey bottle and a lone live projectile on the nightstand. The gun was recovered from the floor between the bed and the wall. Assistant Medical Examiner Hormez Guard performed the autopsy and qualified as an expert in the field of forensic pathology. He gave his opinion, based upon a reasonable medical certainty, that the cause of death was a gunshot wound to the head. Dr. Guard said this type of wound could have been self-inflicted. He found the alcohol content of Ms Nicholas' body to be 0.07 percent.

The Appellant called his estranged wife, who testified that Ms Nicholas was not responsible for breaking up the Ganley marriage. Further, she stated Ganley was not a violent person, nor had he ever exhibited any violence toward her. She acknowledged that she had fired guns which Ganley owned. On one occasion when she suspected a prowler was at her home, she loaded the gun. Later, when she went to unload it, one of the bullets stuck.

Mrs. Carolyn Ganley, the mother of the Appellant, testified that her son was a truthful, non-violent person, who had never given her any problems.

Linda and Glenn Kubany and Vincent and Margaret Campanella testified to Ganley's truthful and non-violent character.

Dr. Brian Crowley qualified as an expert in psychiatry and testified on behalf of his patient, the Appellant. Dr. Crowley found Ganley to have a personality make up not consistent with violent acts. He stated that *based upon testimony*

adduced at trial, information received during office interviewing and the results of psychological testing, it was his professional opinion that Ganley had consumed a sufficient quantity of alcohol to influence his judgment and good sense.

Upon the conclusion of Dr. Crowley's testimony, the court received the following note from Juror Stokes, signed by the foreman, informing the court of his professional bias:

> "I am a certified (Md.) psychologist and my concern is that I have a bias, based on my knowledge, against the interpretation placed on the Psychological test by the Defense witness. Also, other behavior descriptions and interpretations will be judged by me both as a citizen and a Psychologist."

The defense moved for a mistrial, which was denied. Then the court interrogated Juror Stokes and denied a second motion for a mistrial. (Appx. B. infra)

Upon completion of the State's case, Ganley moved for judgment of acquittal, which was denied.

The jury sent a note inquiring as to how long Ganley had been drinking.

Cheryl Lynn Robertson, a part-time employee at the Olney Pub, testified that Ganley stopped by the Pub with a friend around 9:30 p.m., on the night of the shooting. Julie arrived some time later. Ms Robertson served Ganley three light beers and stated Ganley *was intoxicated.*

The Motion for Judgment of Acquittal was renewed and once again denied. The jury found Ganley not guilty of murder in the first degree, but guilty of murder in the second degree and the use of a handgun in the commission of a felony (Count II).

Ganley filed a timely Motion for New Trial and a hearing was held on November 13, 1980, after which the Motion was denied and Ganley was sentenced to the jurisdiction of

the Division of Corrections for a period of 15 years - 15 years as to Count I and 5 years as to Count II, to run concurrent with Count I.

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD DECIDE WHETHER OR NOT IN LIGHT OF THE CIRCUMSTANCES THE TRIAL COURT'S FAILURE TO STRIKE JUROR STOKES FOR CAUSE ABRIDGED THE PETITIONER'S CONSTITUTIONAL RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY, TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM, AND TO DUE PROCESS OF LAW GUARANTEED UNDER THE UNITED STATES CONSTITUTION AND THE MARYLAND DECLARATION OF RIGHTS.

The Sixth and Fourteenth Amendments to the Constitution of the United States and Article 21 of the Maryland Declaration of Rights guarantee an accused the right to be tried by a fair and impartial jury. *Duncan v. Louisiana,* 391 U.S. 145 (1968). In the present case these rights were violated when the trial court refused to strike from the panel a juror who possessed a bias, based on his knowledge as a certified Maryland psychologist, as to testimony offered by the defense on the issue of intent. Further, all concepts of fundamental fairness embodied in the due process clause were violated when the accused was forced to be tried by a tainted jury. The Supreme Court previously addressed the issue of jury impartiality in *Irvin v. Dowd,* 366 U.S. 717 (1961), stating:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. A fair trial and a fair tribunal is a basic requirement of due process. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke a juror must be as "indifferent as he stands unsworn". His verdict must be based upon the evidence developed at trial."

The Supreme Court went on to announce:

> "it is sufficient if the juror can lay aside his impressions or opinion and render *a verdict based on the evidence presented in court.* . . . the adoption of such a rule, however, cannot foreclose inquiry as to whether in a given case the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." (emphasis added)

It is the trial court's application of the aforestated rule that the Petitioner asserts worked a deprivation of his liberty without due process of law. The trial court held dispositive of the question of the juror's bias his ultimate statement that he could render a fair and impartial verdict based only on the evidence as he shall hear it and interpret it. In the instant case defense counsel moved for a mistrial based on the bias declared in the note from Juror Stokes. The note informed the Court that Stokes was using material beyond the evidence in the case and that unquestionably he would use his expertise in the deliberation process. Although "a defendant is entitled to be tried on the evidence and arguments before the jury in open court under the guidance of a judge." *U. S. v. Denno,* 315 F.2d 364 (CA 2, 1963). Further, it is significant that the note was signed by the foreman indicating Juror Stokes' self proclaimed expertise

had been communicated to at least one other juror. Juror Stokes became an expert witness who, in the seclusion of the jury room, was able to controvert Dr. Crowley's testimony without being qualified as an expert in his field, and without being subjected to cross examination, thus denying the Petitioner his constitutional rights guaranteed under the Federal and State constitutions.

Alternatively the Petitioner asserts that should the Court conclude that the note did not contain sufficient information upon which to base a challenge for cause of the juror, certainly the subsequent voir dire of the juror removed any possible doubt. (Appx. B. infra) Upon examining the dialogue that ensued between the Court and Juror Stokes, it is patently obvious that his bias went not to the facts as attested to by Dr. Crowley, nor did Juror Stokes simply reject the conclusion drawn by Dr. Crowley, which was his right; rather Juror Stokes attacked the scientific basis for the expert testimony as being unsound. He put the court and counsel on notice that he as a certified psychologist controverted the accuracy of the methodology underlying the psychological expert's testimony. Juror Stokes advised all present at the bench conference that he intended to evaluate the case both as a citizen and a psychologist as he could not do otherwise. To continue to allow Juror Stokes to sit as a juror after he had formed a steadfast opinion, which both rejected and controverted relevant material and competent evidence that went to the sole issue at trial, the accused's state of mind, constituted a denial of the Petitioner's right to a trial by a fair and impartial jury. Clearly Juror Stokes had formed an opinion which as a matter of law left him incapable of sitting as an impartial fact finder. In *Reynolds v. U.S.*, 98 U.S. 145 (1879), the Supreme Court stated:

"It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill will, but all unite in the holding that it must be founded on some evidence and more than a mere impression. . . .Mr. Chief Justice Marshall in *Burrs Trial* (1 Burrs Trial, 416) states the rule to be that "light impressions which may fairly be presumed to yield to the testimony that may be offered which may leave the mind open to a fair consideration of the testimony constitute no sufficient objection to a juror, but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them which will combat that testimony and resist its force, do constitute a sufficient objection to him."

The theory of law is that a juror who has formed an opinion cannot be impartial.

The test announced in *Reynolds* is:

- Whether the nature and the strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact and to be tried as far as the facts are concerned like any other issue of that character upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trials because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion of the court."

Permitting a juror to continue to participate in the deliberations and determination of an accused's guilt or innocence is not controlled by his repeating the magic phrase he will "render a fair and impartial verdict." The mere utterance of the phrase does not make it so. As to the persuasive authority of the juror's statement, the Supreme Court astutely noted in *Irvin v. Dowd, supra,* 366 at 728, "no doubt each juror was sincere when he said that he would be fair and impartial to the Petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father." In *U.S. v. Chapman,* 158 F.2d 417 (CA 10, 1946) the court reversed and remanded for a new trial a condemnation case wherein the trial court refused to strike for cause a prospective juror who had served as an expert witness for the land owner in a former condemnation case. Despite the prospective juror's testimony he could render a fair and impartial verdict on the evidence and irrespective of the trial court's finding that he was an impartial juror, the appellate court stated:

> [Each party] is entitled to a fair and impartial trial before a jury of twelve impartial and unbiased jurors. Impartiality in the sense that we use it is not a technical concept. It is a state of mind or mental attitude for the determination for which there is no fixed formula. Whether a juror is prejudiced or partial in the sense that one of the parties is denied a fair and impartial trial is not a procedural matter to be determined by statutory construction. It is one of vital substantive law under the Constitution to be resolved according to the highest standards of human conduct. It is a question first addressed to the good sense of the trial judge subject to review under the supervisory powers inherent in an appellate jurisdiction."

As to factors considered in the determination of whether a juror can render an impartial verdict on the evidence, the Court went on to state:

> "A juror's answer to questions touching his state of mind is primary evidence of his competency, but the ultimate question is a judicial one for the Court to decide and in case of doubt justice demands that the challenge be allowed."

More recently in *New Jersey v. Singletary,* 156 N.J. Super. 303, 383 A.2d 1151 (1978) the defendant's armed robbery conviction was reversed and the case remanded for failure to strike a prospective juror for cause who stated he had been a victim of an armed robbery seventeen days before trial. The venireman professed his ability to sit as a fair and impartial juror in the cause and his declaration was the trial court's basis for denial of the challenge for cause. The Superior Court of New Jersey in its reversal applied the principle stated in *State v. Jackson,* 43 N.J. 48, 203 A.2d 1 (1964) cert. denied 379 U.S. 982 (1965)

> "that the trial court should see to it that the jury is as nearly impartial as the lot of humanity will admit. That the impartiality issue should be resolved in accordance with high standards of human conduct and that in the case of doubt justice demands that the challenge be allowed. It was also emphasized that in a sound judicial system not only should justice be done, but also it should appear to be done."

Thus this case presents the interesting issue whether or not, in light of all the circumstances, the trial court's failure to strike Juror Stokes for cause worked a deprivation of the Petitioner's constitutional rights enjoyed under both the

Federal and State constitutions, and served to impeach the integrity of the verdict secured by less than a fair and impartial jury.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Court of Special Appeals of Maryland.

Respectfully submitted,

JOSEPH A. DE PAUL, P.A.

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277-1700

Attorney for Petitioner

APPENDIX A

UNREPORTED

IN THE
COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1632

SEPTEMBER TERM, 1980

JOSEPH MACKIN GANLEY, III

v.

STATE OF MARYLAND

WILNER
COUCH
MCDANIEL,

JJ.

PER CURIAM

Filed: June 24, 1981

In October, 1979, following a jury trial in the Circuit Court for Prince George's County, appellant Joseph Mackin Ganley, III, was convicted of second-degree murder and use of a

handgun in the commission of a felony or crime of violence. He received concurrent sentences of fifteen and five years' imprisonment for murder and use of a handgun, respectively. On appeal, he contends:

I. The trial court erred in refusing to grant appellant's motions for mistrial based upon the notice from one of the jurors.

II. The trial court erred in failing to instruct the jury regarding the effect of voluntary drunkenness on intent.

III. The court as much as directed the jury to return a verdict of second degree murder.

These contentions are meritless; appellant's conviction will be affirmed.

Appellant testified that he and his girlfriend, the victim, were drinking at a local saloon on the night of the shooting. The victim left first, and returned to appellant's apartment, where appellant's roommate and a friend were waiting. A barmaid testified that appellant was "intoxicated" when he left the saloon a short time later. Appellant left the saloon and returned to his apartment. He testified that when he entered his bedroom, the victim was lying on the bed, with his gun (which he normally kept unloaded in his night stand) lying beside her. He stated he went over to the side of the bed, reached over the victim and picked up the gun and that the victim moved down in the bed and turned her back to him. In an effort to clear the gun, he opened the cylinder hit it against the back of his hand and closed it. He stated that he then placed his arm across the victim's back, cocked the gun and pulled the trigger twice. The gun discharged on the second pull of the trigger, killing the victim instantly. Appellant maintained throughout the trial that the shooting had been accidental.

Appellant produced the testimony of an expert in psychiatry that appellant did not have a personality make-up consistent with violent acts. Thereafter, one of the jurors passed a note to the trial court stating:

> "I am a certified (Md.) Psychologist and my concern is that I have a bias, based on my knowledge, against the interpretation placed on the Psychological test by the defense witness. Also, other behavior descritions and interpretations will be judged by me both as a citizen and a Psychologist."

Appellant moved for a mistrial. The court held the motion in abeyance and summoned the juror for *vior dire*. Following questioning by the court and defense counsel the motion for mistrial was denied.

With his attention firmly fixed on the juror's use of the word "bias," appellant argues that the latter "was using his expert knowledge to challenge [appellant's] expert testimony, and that he was allowed "the use of expert evidence beyond that testimony and evidence given in the courtroom." We think the colloquy between and among the court, trial counsel and the juror speaks for itself:

> "THE COURT: What I am interested in inquiring from you, Mr. Stokes, is, are you able to serve as a juror in the trial of the case and render a fair and impartial verdict based only on the evidence that you shall hear? Or do you feel that you are so biased, because you are a psychologist, that you can't render a fair and impartial verdict?
>
> JUROR STOKES: As I tried to say in the note, I'm sure that whatever my judgment would be would partly be because I am a psychologist. I don't know how to really explain it, the way I feel about it.
>
> THE COURT: What I am asking you to respond to specifically is, do you feel that you could give Mr. Ganley, the defendant in this case, a fair and impartial verdict based only on the evidence, and your interpretation of the evidence, and for no other reason?

JUROR STOKES: Considering that my interpretation would be about what I am also, is that what you mean?

THE COURT: I am asking you to respond specifically. Can you serve as a juror and give him a fair and impartial evaluation of the evidence and verdict in the case, based only on the evidence?

JUROR STOKES: I have some questions about that, whether I could.

. . . .

MR. SHOCKLEY: Mr. Stokes, do you feel that based on what you heard so far, you would be biased or prejudiced against this defendant, or that you could not reach a fair and impartial verdict?

. . . .

JUROR STOKES: I don't think I would be especially biased against the defendant.

THE COURT: What does that mean, especially biased?. . .The point that we are discussing, Mr. Stokes, is, we're not concerned with whether you agree or disagree with the evidence, or the interpretation of the evidence, we are only concerned with whether or not you can fairly evaluate the evidence and render a fair and impartial verdict in the trial of the case. Do you understand what I am saying?

JUROR STOKES: Yes.

THE COURT: What is your answer to that?

JUROR STOKES: Yes, I think I could.

THE COURT: Yes, you think you could what?

JUROR STOKES: Render a fair and impartial decision.

MR. DE PAUL: You already told us that you do have bias, and, in fact, you have reflected it in your note, and have stated, taken quite a bit of time before you answered. And as a matter of fact, the question was asked of you several times before you finally answered by saying yes to Judge Blackwell's inquiry.

JUROR STOKES: I now understand the Judge's question. And my answer to his question is yes, I could.

THE COURT: What you are indicating is you don't necessarily agree with the interpretation placed on some of the evidence by a witness?

JUROR STOKES: And that was my concern.

THE COURT: Does that mean that you are biased for or against the defendant in this case? We're not asking how you feel about the overall result in the case, we are asking you whether you can evaluate the evidence fairly as you see it and render a fair and impartial verdict in the trial of the case.

JUROR STOKES: Yes, I am.

MR. DE PAUL: Part of the question the Judge asked you is whether you are biased for or against the defendant, and that's what we would—one of the things we're probing.

JUROR STOKES: I used the word bias in my note because I have some knowledge of some of the tests and so forth. And, therefore, bias means that I lean toward a certain interpretation of these tests because of my training and experiences, that's all I meant.

His question was whether or not I could render a decision based on the evidence as I see it. My answer is yes."

It is well-settled that the decision to grant a mistrial is a matter within the sound discretion of the trial court, and that the court's ruling will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Wilhelm v. State*, 272 Md. 404, 429 (1974). Appellant has failed to demonstrate such an abuse of discretion here. The trial court ruled that he would not disqualify the juror in question, and that the trial would continue. In response to appellant's motion for mistrial, the court explained:

"All he [the juror] says, Mr. DePaul [defense counsel], in his note, and all he related at the conference here at the bench, with the defendant present, is that he has a disagreement with the interpretation placed on the test by the psychologist. But

> he said three times that he feels that he could render a fair and impartial verdict in the trial of the case based on his interpretation of the evidence. And that is all we expect from any juror, whether he is a doctor or a lawyer or psychologist."

We find no abuse of discretion by the trial judge.

II.

Appellant next contends the trial court erred in failing to instruct the jury as to the effect of voluntary drunkenness on intent. Specifically, appellant objects to the trial court's refusal to instruct the jury as follows:

> "There is evidence in this case tending to show that the defendant may have been intoxicated prior to and at the time of the alleged commission of the offenses with which he is charged.
>
> The State has the burden of proving beyond a reasonable doubt that the defendant had the specific intent to commit murder. And you are further instructed that where intoxication exists to a degree that deprives the accused of his capacity to form a specific intent, he cannot be convicted of a crime requiring that intent, such as murder."

But, as the State notes, although it is true that a trial court should give an instruction on every point of law essential to the crime charged and supported by the evidence, nevertheless, it is "not necessary that the court give a requested instruction if the matter is fairly covered in the instructions actually given and the jury was not misled on the subject." *Tipton v. State*, 39 Md. App. 578, 586 (1978). Having reviewed the instructions actually given, we think the issue of intoxication was fairly and thoroughly covered. Again, as the State notes, the trial court's instructions appear to have been taken directly from the approved pattern instructions contained in §5.01 of Aaronson, *Maryland Criminal Jury Instructions and Commentary* (1975). The court's instructions were in com-

plete conformity with Maryland case law governing the effect of voluntary intoxication on intent, *see Gover v. State*, 267 Md. 602, 606-07 (1973), and were sufficient.

III.

Finally, appellant contends the trial court erred in instructing the jury as to malice. Appellant points to the following passages from the court's comments to the jury:

> "Express malice exists when a person kills another intentionally unless the killing is justifiable, excuseable or unless there is a mitigating circumstance. . . .However, a person may commit murder without an actual intent to kill. Malice exists where there is an intent to inflict great bodily harm and there is no justification, excuse or circumstance of mitigation. . . . The use of a deadly weapon directed at a vital part of the body raises an inference of an intent to kill or commit grevious bodily harm. . . .Furthermore, a person may commit murder without an actual specific intent to injure. Malice exists when one wantonly and wilfully in disregard of reasonable human risks does an act, a natural tendency of which is to cause death or great bodily harm and there is no justification, excuse or circumstance of mitigation."

He then goes to great length to justify his argument that "the jury instructions, as given and when taken as a whole, directed the jury to return a second degree murder verdict." But appellant's contention is specious. We have thoroughly reviewed the trial court's instructions to the jury, and find them both correct and sufficient. Despite appellant's assertions to the contrary, the jury could well have found the element of malice lacking in his case, and could therefore have found appellant guilty of manslaughter. If the jury did not do so, it was not because of any error in the instructions.

JUDGMENTS AFFIRMED.

APPELLANT TO PAY THE COSTS.

APPENDIX B

IN THE
CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

STATE OF MARYLAND	)	
	)	
vs.	)	Criminal Trials
	)	
JOSEPH MACKIN GANLEY, III,	)	No. 80-555
	)	
Defendant.	)	
	)	

Excerpt of Proceedings

Courtroom No. 1
County Courthouse
Upper Marlboro, Maryland
Friday, October 10, 1980

BEFORE:

ALBERT T. BLACKWE, JR. Associate Judge

APPEARANCES:

WILLIAM T. SHOCKLEY, Esq. Assistant State's Attorney for Prince George's County, appearing on behalf of the State of Maryland.

JOSEPH DePAUL, Esq., appearing on behalf of the defendant.

SANDRA MIASKOFF
OFFICIAL COURT REPORTER
P.O. BOX 401
UPPER MARLBORO, MARYLAND 20870

EXCERPT OF PROCEEDINGS

THE COURT: We have a note from the foreman. Maybe you better approach the bench.

(Whereupon, counsel and the defendant approached the bench and the following proceedings were hade out of hearing of the jury:)

THE COURT: I guess the defendant ought to be up here.

Charles A Stokes, Mitchellville professor, Bowie State College. "I am a Certified Maryland Psychologist, and my concern is that I have a bias based on my knowledge against the interpretation placed on the psychological test by the defense witness. Also, other behavioral descriptions and interpretations will be judged by me both as a citizen and a psychologist."

He means he may not agree with him.

So—

MR. DePAUL: Judge, I'd like to have an opportunity to discuss this with Mr. Ganley at counsel table for a couple of minutes. It is a very serious matter.

MR. SHOCKLEY: Would the record reflect that Mr. Ganley was here at our bench conference?

THE COURT: Yes.

You don't need the note, do you?

MR. DePAUL: No.

You've read it?

THE DEFENDANT: Yes.

THE COURT: We will recess for another ten minutes.

(Brief recess taken)

THE COURT: Do you need some additional time, Mr. DePaul?

MR. DePAUL: Your Honor, I would like to approach the bench on this matter.

THE COURT: Very well.

(Whereupon, counsel and the defendant approached the bench and the following proceedings were had out of hearing of open court:)

MR. DePAUL: Your Honor, in view of the note that you received from Juror Stokes, I feel compelled and constrained to respectfully move this Court to declare a mistrial on this matter. I don't think there is any room on the panel for this man to serve as a juror. I think he declares himself openly. There is nothing left to be argued as far as I'm concerned. As far as Mr. Ganley is concerned, I think I am under a constitutional restraint to make this move. Therefore, I would respectfully move for a mistrial.

I just don't think there is any choice left for me. I do so after having consulted with Mr. Ganley and Miss Lewis. If more time would assist, I would take more time, but I don't need more time.

MR. SHOCKLEY: Your Honor, I don't think that there is sufficient reason to declare a mistrial. I think certainly any juror who is sitting on a case may very well have some expertise in something that a witness may be called upon to testify. The fact that he may have some expertise in the psychiatric field does not necessarily mean that he could sit and would be an unfair juror to this defendant.

The fact that he may disagree with something that one of the witnesses says—certainly all the jurors are going to be disagreeing with one thing or another that some witness has said during the course of a trial. He just simply says he disagrees with the interpretation on the psychological testing as outlined by the defense witness. So he disagrees with it.

THE COURT: I think it requires maybe a little further persuit. Bring him in and we'll ask him what he means by that. Does he mean that because of his disagreement does he feel he can't give the defendant a fair and impartial judgment in the case?

I mean if all he means is he disagrees with the conclusions arrived at by the defense witness in his interpretation placed on the test, I think that's his prerogative. But if he means he is biased against the defendant, he says he's biased against the interpretation placed on the psychological tests, I don't even know which test he is talking about.

MR. DePAUL: I have no way of guessing, Your Honor. But the man says he's biased, and he says he's biased—

THE COURT: He didn't say he's biased against the defendant. He's saying, in effect, he disagrees.

MR. DePAUL: I apprecaite that. We had *vior dire*, and we also had opening statements, and he was told at some length as to what was forthcoming. And to be frank with you, I don't believe there was any indication on the jury list as to what his occupation was other than he was a professor, I thought.

THE COURT: Professor, Bowie State College.

Waht to bring in Mr. Stokes, please, Charles Stokes?

MR. DePAUL: Your Honor, would you give me a moment? Would you give me a moment to check on something?

THE COURT: About what we're discussing?

MR. DePAUL: Yes, sir. Can I be excused for about two minutes?

THE COURT: I was thinking about taking a recess. Do you need some time?

MR. DePAUL: Well, I wanted to check out something.

THE COURT: Before we discuss—

MR. DePAUL: We are in a position where we may be getting into a situation where this witness will have more information, will be in a position where, frankly, it's severally damaging—I mean the juror will be damaging as a juror. He will be under additional pressure, additional information, additional information in the case. But alwo be under additional pressure. I feel constrained to object to the Court's inquiry. And, Your Honor, I renew my motion for a mistrial.

I think once you take a juror and you focus on him, and go into the processes that—

THE COURT: I am not going into, in detail, any portions of the testimony. I only intend to ask him, does he feel as a result of the information that he supplied us by note that he is not able to give a fair and impartial verdict of the case; not whether he agrees or disagrees with the testimony. All the jurors are going to agree or disagree with some part of it.

MR. DePAUL: I agree, but I feel it's focusing on him individually and bringing undue pressure on him.

THE COURT: In what respect.

MR. DePAUL: As to what his part is in the case.

THE COURT: No more than any other circumstance. You need some additional time?

MR. DePAUL: No, I think I stated my position on it, Judge.

THE COURT: Will you come forward, Mr. Stokes.

Mr. Stokes, you are one of our jury members, is that correct?

JUROR STOKES: Yes.

THE COURT: And you sent a letter to us indicating you are a Certified Maryland Psychologist, and your concern is that you don't agree with some of the interpretations or testimony of one of the witnesses in the case.

JUROR STOKES: Not just one. Several things that have been said by witnesses, I think as a psychologist I would interpret differently.

The behavior—can I given you one example, Judge?

THE COURT: I'm concerned with this proposition, obviously all jurors have beliefs and disbeliefs as to portions of the testimony. It doesn't mean that you have to agree with whatever any one witness is testifying to.

JUROR STOKES: I understand.

THE COURT: What I am interested in inquiring from you, Mr. Stokes, is: Are you able to serve as a juror in the trial of the case and render a fair and impartial verdict based only on the evidence that you shall hear? Or do you feel that you are so biased, because you are a psychologist that you can't render a fair and impartial verdict?

JUROR STOKES: As I tried to say in the note, I'm sure that whatever my judgment would be would partly be because I am a psychologist. I don't know how to really explain it, the way I feel about it.

THE COURT: What I am asking you to respond to specifically is: Do you feel that you could give Mr. Ganley, the defendant in the case, a fair and impartial verdict based only on the evidence, and your interpretation of the evidence and for no other reason?

JUROR STOKES: Considering that my interpretation would be about what I am also, is that what you mean?

THE COURT: I am asking you to respond specifically. Can you serve as a juror and give him a fair and impartial evaluation of the evidence, and verdict in the case, based only on the evidence?

JUROR STOKES: I have some questions about that, whether I could.

THE COURT: You have some questions whether you could?

JUROR STOKES: Correct. I'm not sure whether I could.

THE COURT: Mr. Shockley?

MR. SHOCKLEY: Can I have just a minute to think, Your Honor?

THE COURT: Yes.

Mr. DePaul, while he's thinking—

MR. SHOCKLEY: Mr. Stokes, do you feel that based on what you heard so far, you would be biased or prejudiced against this defendant or that you could not reach a fair and impartial verdict?

JUROR STOKES: If I could give just one example, I think you would understand what I'm saying. Could I give one example?

MR. SHOCKLEY: Well, this is a subjective thing, Mr. Stokes, but in your own mind, whether you in your own mine

feel you could render a fair and impartial verdict based solely on the evidence in the case; certainly every juror can draw on its past experiences.

JUROR STOKES: I don't think I would be especially biased against the defendant.

THE COURT: What does that mean, especially biased. Anything you want to ask?

MR. DePAUL: We would like to state, Your Honor, that in both of the questions that—the questions Your Honor asked and the questions Mr. Shockley asked, Mr. Stokes has been very careful and took long pauses before he has answered, and in both instances he has evidenced bias. And in all fairness to him, we commend him for coming forth saying it.

I have already stated by objection to any interrogation of a juror because it's going to spill over into the deliberating process.

MR. SHOCKLEY: Your Honor, I'm not satisfied that the juror is—Mr. Stokes has just said that he would not be able to give a fair and impartial verdict in the case. I think he has been so candid with the Court, it shows the care that he exercises in wanting to give someone a fair and impartial trial.

THE COURT: The point that we are discussing, Mr. Stokes, is we're not concerned with whether you agree or disagree with the evidence, or the interpretation of the evidence, we are only concerned with whether or not you can fairly evaluate the evidence and render a fair and impartial verdict in the trial of the case. Do you understand what I am saying?

JUROR STOKES: Yes.

THE COURT: What is your answer to that?

JUROR STOKES: Yes, I think I could.

THE COURT: Yes, you think you could what?

JUROR STOKES: Render a fair and impartial decision.

MR. DePAUL: You already told us that you do have bias, and in fact you have reflected it in your note, and have stated—taken quite a bit of time before you answered. And as a matter of fact the question was asked of you several times before you finally answered, by saying yes to Judge Blackwell's inquiry.

JUROR STOKES: I now understand the Judge's question. And my answer to his question is yes, I could.

THE COURT: What you are indicating is you don't necessarily agree with the interpretation placed on some of the evidence by a witness?

JUROR STOKES: And that was my concern.

THE COURT: does that mean that you are biased for or against the defendant in this case?

We're not asking how you feel about the overall result in the case, we are asking you whether you can evaluate the evidence fairly as you see it and render a fair and impartial verdict in the trial of the case.

JUROR STOKES: Yes, I can.

MR. DePAUL: Part of the question the Judge asked you is whether you are biased for or against the defendant and that's what we would—one of the things we're probing.

JUROR STOKES: I used the word bias in my note because I have some knowledge of some of the tests and so forth. And, therefore, I—bias means that I lean toward a certain interpretation of these tests because of my training and experiences. That's all I meant.

His question was whether or not I could render a decision based on the evidence as I see it. My answer is yes.

MR. DePAUL: Mr. Stokes, isn't it fair to say that you would go back in there and you would be likely to say to the jury, I'm a psychologist, Dr. Crowley didn't, in fact, interpret this test properly, and that you give it a different interpretation without there being any evidence to the contrary? In other words, the evidence itself would reflect it to interpretation, but you are giving it a different interpretation, isn't that a form of bias?

JUROR STOKES: But I think all 12 would probably give it a different interpretation. I just wanted the Judge to know that—

MR. DePAUL: I understand. But you would nonetheless—

JUROR STOKES: In terms—in terms of bias against the test, in terms of interpretation.

MR. DePAUL: What I'm getting at is even though the evidence is unimpeached in any way, then, in fact, in reaching your verdict you would be going to evidence beyond the evidence.

MR. SHOCKLEY: I would object to counsel probing Mr. Stokes with respect to—

THE COURT: —how he would decide—

MR. SHOCKLEY: —how he would deliberate and interact with the other jurors.

THE COURT: All I am concerned about is whether he's able to render a fair and impartial verdict in the case, as far as any parties are concerned, the defendant especially. Giving him the knowledge, he has a right to interpret the evidence as to what it means to him.

I think that the note indicates that when he says bias, he is—he's using that word to mean he has a different opinion as to how different tests should be interpreted.

MR. DePAUL: Your Honor, I respectfully disagree with Your Honor, and I stated it, and I frankly respectfully have to object to the Court's going into this area, as I said earlier, because I think it, in fact, does, to a sense, enlargen the deliberative process through our inquiry, and place the juror in a position of pressure.

THE COURT: Do you think you could continue on, Mr. Stokes, in the trial of this case, and render a fair and impartial verdict based only on the evidence as you shall hear it and you interpret it?

JUROR STOKES: Yes.

THE COURT: All right, I am going to continue on with the case, gentlemen.

MR. SHOCKLEY: Thank you, Your Honor.

MR. DePAUL: Your Honor, we renew our motion.

THE COURT: Yes.

You may return to the jury holding room—Mr. Stokes, one other thing, I would just not discuss anything with reference to the bench conference with the remaining panel.

JUROR STOKES: I didn't do so, I just wrote the note.

MR. DePAUL: We understand that, and thank you, Mr. Stokes.

(Bench conference continued without the presence of Juror Stokes.)

MR. DePAUL: Your Honor, we further not only would renew our motion for mistrial on the grounds we stated

earlier, but furthermore move for mistrial on the grounds that this witness is having to be put as a protagonist, and having to look on us as having to be a protagonist. It's not only a trial on Joseph Mackin Ganley, but now it's a trial of Dr. Crowley's testimony, without any evidence to contradict it. And during the inquiry that Your Honor has heard, we placed the focus—focused everything on the witness and put the witness in a position that, in fact, made him a protagonist. And it creates a bias against Mr. Ganley. Now he has to defend what he has put in the note to you. He has to take the position that even though—that he's going to go beyond the evidence, that's what we say to the Court. He's not going to accept the evidence that he heard. He is going to, in fact, use his own evidence to dispute the evidence. There is no evidence of an expert nature here to contradict what Dr. Crowley has testified to.

THE COURT: All he says, Mr. DePaul, in his note, and all he related at the conference here at the bench, with the defendant present, is that he has a disagreement with the interpretation placed on the test by the psychologist. But he said three times that he feels he can render a fair and impartial verdict in the trial of the case based on his interpretation of the evidence. And that is all we expect from any juror, whether he's a doctor or a lawyer or psychologist.

MR. DePAUL: He didn't say any—just one test, he said there were other areas, several.

THE COURT: He's saying he disagrees with the psychiatrist. He has a right to do that.

MR. DePAUL: And other witnesses, he said as to interpretation.

Frankly, I don't think he has shown a considerable bias, it's a prejudgment in the case.

THE COURT: You have your objection on the record. This note will be made a permanent part of the record.

MR. DePAUL: I am actually moving for mistrial on two occasions. I would like Your Honor to rule on them.

THE COURT: I am going to deny your motion for a mistrial. Based on the interrogation of the juror here at the bench, with all persons present, including counsel and the defendant, and based on the juror's response, the Court feels that we should proceed with the case.

MR. DePAUL: Thank you, Your Honor.

(Whereupon, counsel and the defendant returned to the trial tables.)